

STATE OF IOWA  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

UE LOCAL 893 - IOWA UNITED )  
PROFESSIONALS, )  
Complainant, )  
and )  
STATE OF IOWA (DEPARTMENT OF )  
PERSONNEL), )  
Respondent. )

CASE NO. 5475

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PUBLIC EMPLOYMENT  
RELATIONS BOARD

PROPOSED DECISION AND ORDER

UE Local 893 - Iowa United Professionals (IUP) has filed a prohibited practice complaint with the Public Employment Relations Board (PERB) against the Iowa Department of Personnel (the State) pursuant to section 11 of the Public Employment Relations Act (the Act), Iowa Code chapter 20. IUP alleges that the State committed a prohibited practice within the meaning of sections 20.10(1) and 20.10(2)(a) and (e)<sup>1</sup> by refusing to supply certain information which IUP deemed necessary for its grievance representation of a member of an IUP-represented bargaining unit. The State has moved to dismiss for want of jurisdiction in PERB due to the complaint's allegedly-untimely filing. IUP has resisted the State's motion.

The parties agreed to the submission of the motion upon a record consisting of the contents of PERB's file, without further proceedings. Having reviewed the complaint and its attached exhibits, the State's motion and IUP's resistance, I propose the following Findings of Fact and Conclusions of Law.

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<sup>1</sup>These and all other statutory references are to the Code of Iowa (1995).

## FINDINGS OF FACT

IUP is an employee organization within the meaning of section 20.3(4) and has been certified as the exclusive bargaining representative of a unit of employees of the State of Iowa, a public employer within the meaning of section 20.3(11).

The State and IUP are parties to a collective bargaining agreement effective from July 1, 1995 through June 30, 1997. At some time during the term of this agreement a grievance was commenced by IUP on behalf of a discharged employee who had been employed at the Iowa Department of Human Services (DHS) in a position within the IUP-represented unit.

On September 8, 1995, an IUP representative wrote to the Iowa Department of Personnel, the State's employment relations representative, requesting a number of specifically-identified documents "in order to prepare for a third step grievance hearing" concerning the discharged employee. Among the documents requested were copies of disciplinary letters issued by DHS to the discharged employee's supervisors. IUP's request was forwarded to DHS for assembly of the requested information, and on October 19, 1995, a DHS administrative officer responded to the IUP request, providing copies of most of the requested documents but refusing to provide copies of the disciplinary letters issued to the supervisors.

The parties seemingly agree that the instant complaint was filed with PERB on April 8, 1996, although the official PERB file reveals that IUP initially filed the complaint, naming DHS as

Respondent, on March 11, 1996, then filed the pending amended complaint against the Department of Personnel on April 5, 1996.

#### CONCLUSIONS OF LAW

Iowa Code section 20.11 provides, in relevant part:

**20.11 Prohibited Practice Violations.**

1. Proceedings against a party alleging a violation of section 20.10, shall be commenced by filing a complaint with the board within ninety days of the alleged violation causing a copy of the complaint to be served upon the accused party in the manner of an original notice as provided in this chapter. . . .

This 90-day limitations period is mandatory and jurisdictional. Brown v. PERB, 345 N.W.2d 88, 93-4 (Iowa 1984).

The State asserts that PERB is without jurisdiction in the instant matter because the refusal to provide the requested information--the event upon which IUP bases its complaint--occurred on October 19, 1995, more than 90 days prior to the complaint's filing.<sup>2</sup>

IUP acknowledges that the State's refusal to supply the disciplinary documents occurred on October 19, 1996. It resists the State's motion, however, on the ground that the underlying grievance for which the documents were requested has not yet been resolved and that the harm resulting from the refusal is ongoing. Although citing no authority in support of the proposition that its complaint is not time-barred because the harm resulting from the

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<sup>2</sup>It is unnecessary to determine whether IUP's amended complaint filed April 5, 1996 relates back to the date of the filing of its original complaint (March 11, 1996) since even if the earlier date is employed, no complaint was filed until 144 days following the State's refusal to provide the requested information.

allegedly-prohibited act is still ongoing, IUP appears to be relying upon a "continuing violation" theory.

The leading case concerning the "continuing violation" doctrine is Local Lodge No. 1424, Int'l Assn. of Machinists v. NLRB, 362 U.S. 411; 80 S.Ct. 822; 4 L.Ed.2d 832; 45 LRRM 3212 (1960) ("Bryan Manufacturing"). I cannot read that case as supporting the union's apparent contention.

In Local Lodge No. 1424, the Court's majority emphasized that two different situations must be distinguished:

The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose [the statute of limitation] ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Id. at 45 LRRM 3214-15.

Thus, we focus on events alleged to have occurred within the limitations period to ascertain whether such events, in and of themselves, may constitute a prohibited practice or whether such

events may be viewed as a prohibited practice only through reliance on earlier events outside the limitations period.

In this case, even assuming the amended complaint relates back to the date of IUP's initial filing, the complaint reaches back 90 days from such filing to December 13, 1995. Although IUP does not allege the occurrence of any event during this 90-day period, it appears from its resistance that the State, having refused to supply the requested documents in October, did not change its position and thus not only refused to supply the documents initially, but also did not supply them during the limitations period. There is absolutely no allegation of any active occurrence during the limitations period itself.

The State's apparent total inactivity during the limitations period can be viewed as a prohibited practice only if one deems the State's initial refusal to have been a violation of the statute and then attributes that evil to its inaction during the limitations period, thus impermissibly "cloaking with illegality" inaction which was, standing alone, completely lawful.

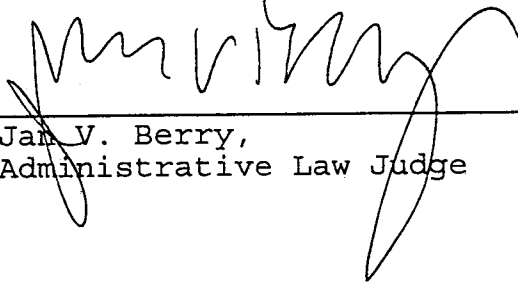
What this case presents is a situation which even the dissent in Local Lodge No. 1424 seemingly acknowledged would not constitute an appropriate application of a continuing violation doctrine--a "mere inert continuity of consequences through antecedent action" during the limitations period, rather than the occurrence of events "brought to pass through conscious human intervention within [the limitations period]." Id., 45 LRRM at 3223.

I consequently reach the same conclusion as did the court in NLRB v. Electric Furnace, 327 F.2d 373 (6th Cir. 1964), a case also involving an employer's refusal to provide requested information. The State's refusal to furnish the requested information occurred on October 19, 1995. To hold that this act continues indefinitely in the absence of even a claim of further requests by IUP would do violence to the requirements of section 20.11(1) and would render that mandatory and jurisdictional provision of the Act virtually impotent. See 327 F.2d at 376. IUP's complaint is time-barred and PERB is without jurisdiction to adjudicate it. Consequently, I conclude the State's motion must be granted and propose entry of the following:

ORDER

The prohibited practice complaint filed herein by UE Local 893 - Iowa United Professionals is hereby DISMISSED.

DATED at Des Moines, Iowa this 28th day of June, 1996.



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Jan V. Berry,  
Administrative Law Judge